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Nos. 82-1860 and 82-1862

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SCHNEIDER MOVING and STORAGE COMPANY,
Petitioner

and

PROSSER'S MOVING and STORAGE COMPANY,
Petitioner

v.

LORAN W. ROBBINS, MARION M. WINSTEAD, HAROLD J. YATES, ROBERT J. BAKER, HOWARD MCDOUGALL, THOMAS F. O'MALLEY, and R. V. PULLIAM, Trustees of the Central States Southeast and Southwest Areas Pension Fund,
Respondents,

and

LORAN W. ROBBINS, MARION M. WINSTEAD, HAROLD J. YATES, ROBERT J. BAKER, HOWARD MCDOUGALL, THOMAS F. O'MALLEY, and R. V. PULLIAM, Trustees of the Central States Southeast and Southwest Areas Health and Welfare Fund,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER PROSSER'S MOVING AND STORAGE COMPANY

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REPLY BRIEF FOR PETITIONER PROSSER'S MOVING AND STORAGE COMPANY

ARGUMENT I

The Union And Prosser Intended To Reserve For Themselves The Right To Settle Disputes About The Meaning Of The Collective Bargaining Agreements By Use Of The Grievance And Arbitration Procedures Of The Contracts.

The Union and Prosser reserved the right to settle disputes about the meaning of the collective bargaining agreements by grievance and arbitration procedures. That this reservation applies to the dispute in this case was demonstrated in Prosser's brief in the following particulars:

(1) The clear and unequivocal language of the collective bargaining agreements (Prosser Brief at 18, J.A. 55);

(2) The comparably ambiguous language of the trust indentures (Prosser Brief at 20, J.A. 22);

(3) The conduct and bargaining history of the parties (Prosser Brief at 21, J.A. 99-108);

(4) The application of general contract law requiring trustees, as third party beneficiaries of the collective bargaining agreements, to be bound by the promise of the employer and union to arbitrate disputes[1] (Prosser Brief at 11-17);

(5) Laws which establish: (A) the duty and right of the union to act as the exclusive bargaining representative of employees; (B) a national labor policy favoring arbitration; and (C) a presumption that parties intend to settle disputes by arbitration. (Prosser Brief at 22-28);

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[1] "Where the contract contains an arbitration clause which is legally enforceable, the general view is that the beneficiary is bound thereby to the same extent that the promissee is bound. "*A Treatise on the Law of Contracts,* Williston, § 364A, at 877 (3rd Ed.1959).

(6) Federal pension and welfare laws which: (A) set the duties of fiduciaries of employee benefit trusts; and (B) establish the scope of fiduciaries rights to administer such trusts while in balance with the rights and duties of employee representatives to administer and enforce the terms of the collective bargaining agreement. (Prosser Brief at 28 - 47)

In response, *amici curiae* American Federation of Labor and Congress of Industrial Organizations (hereinafter, AFL-CIO) maintains that the trust agreements, not the collective bargaining agreements, are the documents which set forth the powers and duties of the Trustees, and that those agreements do "not condition or qualify the power of the Trustees to bring suit." (AFL-CIO Brief at 8)

This interpretation ignores the contractual scheme of the entire agreement bargained by the Union and Prosser, and accepted by the Trustees. The collective bargaining and trust agreements, when read together, separate the right to interpret the collective bargaining agreement from the right of the Trustees to institute suit to collect delinquent contributions. It must first be determined that contributions are "due and owing the fund" under the collective bargaining agreement before the Trustees are empowered to collect payments.

The AFL-CIO suggests that if the parties intended that interpretive disputes be processed through the contract arbitration procedure, then they, in all likelihood, would have provided the Trustees direct access to the arbitration process. (AFL-CIO Brief at 9) Whether the parties can authorize the Trustees to engage in such activity is questionable. In light of the general impropriety of trustees engaging in the settlement of grievances, *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981), no presumption of intent can be drawn from the fact that the contracts do not

provide the Trustees an independent right to invoke the arbitration procedure.[2]

ARGUMENT II

The Union Has A Vital Interest In Enforcing The Contractual Rights Of Active Employees And Can Be Relied Upon To Exercise Its Statutory And Contractual Duty To Prosecute Meritorious Claims.

A. The Rights To Be Arbitrated Are Contractual

The Trustees contend that, because they are claiming *statutory* rights on behalf of participants in the Fund, arbitration of these statutory rights is inappropriate. The Trustees fail, however, to specify what statutory rights they seek to enforce.[3]

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[2] In *Central States Southeast and Southwest Area Funds v. Howard Martin*, 625 F.2d 171 (7th Cir.1980), the Trustees were unsuccessful in convincing the court that they should not be bound by the parties' agreement to arbitrate because they had no right to invoke the arbitration machinery of the contract. It is interesting to note that the 1982 National Freight Agreement, to which Howard Martin became a party was amended to expressly provide the Trustees with direct access to grievance procedures. (Trustees' Brief at 17, N 9.) By doing so, the parties evinced an intent both to arbitrate the disputes and to allay the Trustees' concern for domination and control by the union or employer.

[3] The Trustees appear to argue that because they have a statutory right to damages, attorney fees and penalties under § 502(g)(2) ERISA, 29 U.S.C. Sec. 1132(g)(2), arbitration is an inappropriate forum in which to settle the disputes raised by the Trustees. If this is the position of the Trustees, they beg the question. Whether the Trustees are entitled to relief under §502(g)(2) ERISA is dependent upon whether they have standing to sue under the provisions of § 515 of ERISA, 1980, 29 U.S.C. § 1145. Trustees' standing is dependent upon their contractual right to litigate the meaning of the contract with Prosser.

The Trustees rely upon the Court's reasoning in *Barrentine v. Arkansas-Best Freight Systems,* 450 U.S. 728 (1981) and *Alexander v. Gardner-Denver,* 415 U.S. 36 (1974), to support this theory. Such reliance is misplaced. *Barrentine* and *Alexander* are not dispositive because "[t]he underlying dispute here does not involve substantive statutory rights, but rather, the Trustees' right to receive employer contributions. This right to contributions arises solely from the provisions of the collective bargaining agreements and not from those statutes dealing with the independence of Trustees or of the Fund." *Robbins v. Prosser,* Prosser Pet.Cert. at 36, dissent of J. Henley.

An individual employee has no separate or distinct statutory right to a pension or welfare benefit independent of the collective bargaining agreement. A benefit is only created or waived through the "majoritarian process" of collective bargaining. "[W]hen neither the collective-bargaining process nor its end product violates any command of Congress, a federal court has no authority to modify the substantive terms of a collective bargaining contract." *United Mine Workers of America Health and Retirement Funds v. Robinson,* 455 U.S. 562, 576 (1982).

Questions of coverage for pension or welfare benefits under the collective bargaining agreements are typical labor disputes which are well suited for resolution by an arbitrator. That the union may represent competing interests in the collective bargaining unit is irrevelant to this case, for such is the nature of the union's representative role and responsibility. Congress specifically recognized that employee benefits are the end product of mandatory collective bargaining and, thus, dependent upon the good faith bargaining and fair representation of the union. See, *NLRB v. Amax Coal Co.,* 453 U.S. 322, 332 n.14 (1981).

B. The Union Has A Vital Interest In The Arbitration Of These Disputes

The Trustees argue that the Union cannot be relied upon to arbitrate contract disputes on behalf of the Funds because potential conflicts may exist between the Union's constituency and the Funds' participants and beneficiaries (in particular, retirees and their families). The Trustees suggest that the Union, because it does not represent retirees and their beneficiaries, does not have a compelling interest in the arbitration of the contract disputes raised by the Trustees in their petition. This argument is not supported by the facts of this case. The issues to be arbitrated in this case involve coverage and contributions on behalf of active employees.

Contribution to the fund is a part of the consideration Prosser has agreed to pay for the services of its "covered" employees. In the event that the Union believes that Prosser is failing to make full contributions on behalf of all covered (regular) employees, the Union's members will not have been paid in full for their labor in accordance with the collective bargaining agreement. *United States v. Carter*, 353 U.S. 210, 218 (1957).

Settlement of coverage questions and the payment of contributions are a primary and vital interest of the active employees and the Union. To assert otherwise is to ignore the fact that the Union has repeatedly bargained for such benefits. Whatever interest retirees and beneficiaries have in these disputes is at best secondary to the interest of the active workers, on whose behalf the contributions are made. Given the interest of active employees, the Union can be relied upon to arbitrate meritorious disputes posed by the Trustees.

The Trustees also maintain that because the disputes may effect non-union workers only, or due to the cost of arbitration, the union may lack incentive to arbitrate a meritorious dispute. Neither of the Trustees' hypotheses are supported by the record

in the Prosser case. All of Prosser's employees who are directly effected by the disputes are union members, and there is no evidence that the Union lacks resources to arbitrate the disputes.

The AFL-CIO takes the Trustees' arguments one step further. It argues that if the union in good faith disagrees with the merits of the trustees' dispute, that the trustees should be allowed to exercise their independent judgment and to press their interpretation to litigation with the employer. The AFL-CIO claims to see no problem with a court interpreting an agreement in a manner which conflicts with the construction adopted by the union and employer.

Such a result, however, would violate the intent of the parties, disrupt labor-management relations, require employer contributions not required by the collective bargaining agreement and allow a federal court to substitute its construction of the contract for that of the parties. *NLRB v. Amax Coal Co.*, 453 U.S. 332, 336 (1981); *United Mine Workers Of America Health And Retirement Funds v. Robinson*, 455 U.S. 562 (1982); *Carbon Fuel Company v. Mine Workers*, 444 U.S. 212, 218-219 (1979). This is precisely the reason that the Trustees should not be allowed to litigate before the Union and Prosser have an opportunity to settle on an interpretation of the agreement which will bind all parties.

ARGUMENT III

Allowing The Trustees To Litigate Collective Bargaining Disputes Creates A Substantial Risk That Trustees Will Compromise Their Strict Fiduciary Duties To The Fund Participants And Beneficiaries.

A rule disparaging arbitration and allowing trustees to litigate the meaning and intent of collective bargaining agreements directly with the employer cannot be justified on the basis of hypothetical and speculative threats to the independence of trustees. Such a drastic rule is neither required by the federal welfare and pension laws, nor by any decision of this Court. Aside from the effect it would have on the scheme of federal labor laws and labor management relations, the rule unnecessarily places trustees in a role which fundamentally conflicts with the duties of trust fund fiduciaries as dictated by Congress and defined by the Court.

If allowed to litigate these types of disputes, trustees will become embroiled in representing the partisan interest of the union, and, for all practical purposes, will be involved in an extension of collective bargaining. The neutral and independent role of trustees may, in fact, be sacrificed. See *NLRB v. Amax Coal Co.*, 453 U.S. 322, 336 and § 302(c)(5) LMRA 1947, as amended, 29 U.S.C. § 186(c)(5).

The trustees will be pressured by the practicalities of litigation to negotiate, compromise and settle disputes arising under the collective bargaining agreement. In all probability they will be forced to succumb to pressure and engage in compromise, which is wholly inconsistent with the duties of fiduciaries as mandated by § 1104. *NLRB v. Amax Coal, Id.* at 336.

It is the union's exclusive statutory and contractual duty to represent employees of the bargaining unit. § 9 NLRA, 29 U.S.C. § 159 (1976). The union, through its members, is to bear the costs of administering, enforcing and settling demands

through grievance and arbitration procedures. Permitting trustees to test the limits of a collective bargaining agreement will allow the union to sit back without financial or other risk and await a court's decision. If unsuccessful, benefit funds will incur the expense of litigation and possibly be ordered to pay the attorney fees and costs of the employers. § 502(a)(1) ERISA, 29 U.S.C. § 1132(a)(1).

The expenditure of fund assets to litigate the interests of employees who are judicially determined to be ineligible to benefit from the funds may expose the trustees to personal liability for incurring expenses not reasonably related to the administration of the funds § 404(a)(1)(A)(ii) ERISA, 1974, 29 U.S.C. § 1104(a)(1)(A)(ii)) or for engaging in a prohibited transaction by providing services or using funds for the benefit of a party in interest - the union. § 406(a)(1)(c)&(d) ERISA, 1974, 29 U.S.C. § 1106(a)(1)(c)&(d). Such a result is antithetical to the clear intent of Congress to insulate fund assets and fiduciaries from the interests of the union and the battles of collective bargaining. See, *NLRB v. Amax Coal Co., Id.* and Sec. 302(c)(5) LRMA.

There will be cases which will justify the trustees' litigation of labor-management disputes directly with the employer, but these will be the exception. Only by reaffirming the rule favoring arbitration, and thus giving effect to the clear intent of Congress, may the roles of the trustees and union be harmonized.

CONCLUSION

For the foregoing reasons, and for the reasons stated in its Brief on the Merits, Prosser respectfully submits that the decision of the Eighth Circuit was erroneous and should be reversed and that the order of the District Court dismissing the complaint should be affirmed.

Respectfully Submitted,

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